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DEIS at 1-7. Nonetheless, it is unrealistic to assert that in the event the Colorado River Basin is experiencing drought and low reservoir conditions, thus triggering the need for the Secretary of the Interior to reduce the annual amount of water available for consumptive use from Lake Mead to the Lower Basin states below 7.5 million acre-feet, that the Upper Basin states and tribes would not be affected.

The Secretary has a variety of responsibilities over the waters of the Colorado River pursuant to the Law of the River as reflected in the documents set forth in Table 1.7-1. DEIS 1-13. Additionally, and to no lesser extent, the Secretary has a fiduciary responsibility to the Tribe to protect tribal trust resources. As an agency of the federal government, the Bureau of Reclamation ("Reclamation") has a trust responsibility to all Indian tribes and tribal members, including the Southern Ute Indian Tribe and its members:

The United States has an Indian trust responsibility (trust responsibility) to protect and maintain rights reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and executive orders, which rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect trust assets.

See Attachment 5, Bureau of Reclamation, Indian Trust Asset Policy (Aug. 31, 1994) in Protection of Indian Trust Resources (notebook on file with the Department of the Interior).¹

The Indian Trust Assets entitled to protection under the trust responsibility include water rights. *See id.* Thus, Reclamation has a trust responsibility to take all actions reasonably necessary to protect the Tribe's water rights, including its historic, existing and future use water rights. In fact, the United States' trust responsibility to the Tribe is of "the highest fiduciary standards," *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 678 (1986), *aff'd*, 877 F.2d 961 (Fed. Cir. 1989),² and it does not wane because Congress has imposed upon it additional statutory obligations. *Nevada v. United States*, 463 U.S. 110, 128 (1983). Certainly, the United States may not subordinate its trust responsibility to protect the Tribe's rights by claiming that the interim guidelines for Lower Basin shortages must be enforced.

¹In February 1996, then Secretary of the Interior Babbitt and Assistant Secretary Deer transmitted to Interior employees a compilation of the policies and procedures adopted by the bureaus and offices of the Department of Interior relating to trust protection practices. This compilation notebook is referred to herein as "Protection of Indian Trust Resources."

²See also *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 74 (Ariz. 2001).

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II. RECLAMATION SHOULD SELECT A PREFERRED ALTERNATIVE

The DEIS provides that:

Reclamation has not identified a preferred alternative in the Draft EIS. The preferred alternative will be identified following public comments on the Draft EIS and will be expressed in the Final EIS. The preferred alternative may be one of the specific alternatives described below or it may incorporate elements or variations of these alternatives.

DEIS ES-3. By failing to identify a preferred alternative, the federal, state, tribal and local agencies are unable to provide any comments – an important part of the NEPA full disclosure process. Moreover, the Tribe is unable to determine whether the preferred alternative is in its best interests. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, Jr., concurring in part, dissenting in part), *modified on reh'g*, 782 F.2d 885 (10th Cir.), *modified*, 793 F.2d 1171 (10th Cir.) (adopting concurring/dissenting opinion of Seymour, J.), *cert. denied sub nom. Southern Union v. Jicarilla*, 479 U.S. 970 (1986).

Particularly troubling is Reclamation's assertion that it may cobble together a preferred alternative that "incorporate[s] elements or variations of these alternatives." DEIS at ES-3. Stated another way, Reclamation may select a preferred alternative upon which no one had an opportunity to comment. It is the federal action as a whole that may have an adverse effect on the natural and/or human environment, not the constituent elements of various possible federal actions. Indeed, it is not possible to provide comments on separate pieces of possible federal actions because the alternatives set forth in the DEIS are not divided up into components, and, therefore, it is entirely unclear how Reclamation would select "elements or variations" of the identified alternatives in order to come up with a sixth, and heretofore unidentified, alternative. The "shuffle and deal" approach to identifying the preferred alternative is contrary to NEPA and Interior's NEPA-implementing regulations.

If Reclamation selects one of the alternatives set forth in the DEIS as its preferred alternative, the Tribe should nevertheless have an opportunity to provide additional comments at the time when Reclamation makes its selection because then the Tribe will be able to determine whether the preferred alternative is in its best interests. The Tribe acknowledges that the regulations do not require Reclamation identify a preferred alternative in the DEIS,³ nevertheless based on the

³The applicable regulation provides the following:

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment . . . and the Environmental Consequences . . . , it should present the environmental

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Secretary's trust responsibility, the Tribe should be given the opportunity to comment once Reclamation has selected its preferred alternative well in advance of release of the final environmental impact statement. If, on the other hand, Reclamation devises as its preferred alternative a new alternative from pieces of the existing alternatives in the DEIS, Reclamation should reissue a new draft environmental impact statement for public comment, since there will have been no public comment on that federal action.

We appreciate the opportunity to comment on the DEIS and look forward to providing comments on the preferred alternative once it has been either selected or formulated.

Sincerely,


M. Catherine Condon

MCC/dav

cc: Council Member Jimmy Newton
Jim Formea
Chuck Lawler

impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

....

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.